NO. 2741

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IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

W. L. SPALDING and THE RELIANCE MINING COMPANY, a Corporation,

Appellants,

vs.

S. A. MARTIN,

Appellee.

Appeal From United States District Court, Territory of Alaska, Fourth Division.

BRIEF OF APPELLEE

MORTON E. STEVENS
Attorney for Appellee

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Statement.

The statement of the case in appellant's brief is substantially correct with the exceptions as hereinafter set forth.

1. There are no "other creditors" seeking liens except laborers upon and about the mining property in controversy.

2. Referring to the last paragraph on Page 5 and continuing on page 6 of appellant's brief, appellee contends that the notices of nonliability described, were not prepared in accordance with law then in force and that the same were not signed, as stated in said brief, and contend that the ground referred to in said notices des-

cribed the same as "said PLACER mining claim" and could not relate to the quartz mining claim in controversy herein. (Tr. pp. 248, 249, 250, and 260 to 268, both inclusive.)

3. Referring to the first paragraph beginning on page 6 of said brief, appellee contends that the extension of the written lease, by resolution of the board of directors of the lessor corporation, was not a *verbal* extension, but was an extension in writing and attached to the original written lease and might thereafter have been duly recorded. (Tr. 236, 237.) Appellee further contends that the particular lease under which defendant Spalding was operating said mine, always was in doubt so far as the laborers could ascertain, and was probably in doubt at the time of the court's decision. (Tr. pp. 236 to 246, both inclusive.)

4. Referring to the bottom of page 7 and top of page 8 of said brief, appellee contends that the allowance made by the court below for the use of a team belonging to Wm. Ahlmark was allowed in connection with his labor in hauling wood and supplies for said mine. (Tr. pp. 187 to 191, both inclusive.)

Appellee contends that under the lien law set forth in Chapter 79, Session Laws of 1913, it was immaterial whether the labor, for which liens were sought, consisted of prospecting or development work or actual mining, as heretofore distinguished by this court under a former statute, and contends further that by the terms of the lease and the verbal extension thereof, under which ap-

pellants claim such labor was performed, such distinction was eliminated, as both the lessor and lessee thereof recite therein that the object of such lease is "for the purpose of prospecting and developing the same", (referring to said property leased). (Tr. p. 252.) That said lease further provides that, for and in consideration of the services rendered by the lessees in *opening* and *developing* said property, said lessees shall retain all of the gold and other precious metals and minerals extracted from the portion of said claim therein leased, and not to pay to lessor any part or portion thereof. (Tr. p. 253.)

Citation From Compiled Laws of Alaska.

Appellants, in setting forth Sec. 694, Comp. Laws of Alaska, omitted in line 4, page 27, of their brief, the following: "shall be held to have been constructed at the instance of such owner or person having or claiming any interest therein."

Sec. 697. No lien provided for in this code shall bind any building, structure, or other improvement for a longer period than six months after the same shall have been filed, unless suit be brought before the proper court within that time to enforce the same, or, if a credit be given, then six months after the expiration of such credit; but no lien shall be continued in force for a longer time than one year from the time the work is completed by any agreement to give credit.

Sec. 699. Actions to enforce the liens created by this code shall be brought before the district court, and the pleadings, process, practice, and other proceedings shall be the same as in other cases. * * * *

In all actions under this chapter the district court, upon entering judgment for the plaintiff, allow as a part of the costs all moneys paid for the filing and recording of the lien, and also a reasonable amount as attorney's fees. * * * *

In all actions to enforce any lien created by this chapter all persons personally liable and all lien holders whose claims have ben filed for record under the provisions of section six hundred and ninety-five shall, and all other persons interested in the matter in controversy or in the property sought to be charged with the lien may, be made parties; but such as are not made parties shall not be bound by such proceedings. The proceedings upon the foreclosure of the liens created by this code shall be, as nearly as possible, made to conform to the proceedings of a foreclosure of a mortgage lien upon real property.

Argument.

The most important question raised by appellant's assignments of error goes to the validity of the act of the Alaska Legislature on the subject of liens. Chap. 79, Ses. L. 1913.

We concede that in the construction of a statue, courts are led to put such interpretation upon the act of a legislature as will avoid conflict with the constitutional or restricted power of the legislature; but contend that the courts will give full force and effect to the meaning and intent of the legislature, when it can be done without an extravagant, restrained and fantastic construction; and also that the lawmaking body is always presumed to have

acted within the scope of its powers. The generality of a title is no objection and it is within the province of the legislature to determine for itself, how broad and comprehensive shall be the object of a statute and how much particularity shall be implied in the title of the act.

Cooley Const. Lim. p. 174.

Marsten et al vs. Humes, Judge, et al, 28 Pac. (Wash.) 520.

Statutes relating to the same subject matter must be construed in pari materia. This may include the earlier statutes and such as have expired or been repealed as well.

Sec. 34 and 48, Endlich on the Interpretation of Statutes;

Northern Commercial Co. vs. United States, 217 Fed. 33. (9th circuit.)

We, therefore, submit that it is disclosed, by the briefs herein, that for a number of years prior to the act in question, a lien law for laborers on mines, etc., existed, and by the interpretation of such statute by this court in

Cascaden vs. Wimbish, 161 Fed. 241; followed by

Pioneer Mining Co. vs. Delamotte, 185 Fed. 752;

Andrews vs. Ladd, 188 Fed. 313;

Noble vs. Gustafson, 204 Fed. 69,

a laborer was denied a lien for labor performed in actual mining, as distinguished from prospecting and development work. That this interpretation led to the passage of the act of the legislature in question. That the legislature undertook to change this law and enlarge the pro-

tection to laborers, by eliminating this distinction between mining and development, and in so doing passed the act entitled: "An act to create, establish and provide for liens on mines in favor of laborers and material men, and repealing all acts and parts of acts in conflict therewith."

Plaintiff below, at the trial of said cause, contended that this act did not repeal or take the place of the former legislation upon the subject, excepting where the same conflicts with parts thereof. And this is the reason why the Alaska Legislature omitted the time within which a lien should be filed, because thirty days are provided in the old act, and this is the reason why the allowance for drawing the lien, filing the same, and for attorney's fees to plaintiff in the foreclosure of such liens, were omitted, as well as the proceeding to enforce and foreclose such liens. The trial court did not in all respects adopt this view, and while it held the act valid, yet treated the same as an independent act, and it necessarily followed that plaintiff's allowance for costs of drawing the lien, filing the same, and for attorney's fees, were disallowed, and no appeal therefrom was taken. After this decision, and probably by reason thereof, the Legislature, in 1915, passed another lien law entitled: "An Act to provide for the liens of laborers and miners working on, in and about mines and mining property, repealing the act of the legislature of the Territory of Alaska, entitled 'An Act to create, establish and provide for liens in favor of laborers and material men, and repealing all acts in conflict therewith', approved April 30, 1913, and declaring an emer-

gency."

Chap. 13 p. 29, Ses. L. 1915.

Appellants' brief, p. 77.

By this act a lien is given for mining as well as for development work, and is also given upon the machinery, stamp mills, etc., following generally the act of 1913, and providing for attorney's fees, costs, etc.

It follows, therefore, that the questions raised are of no general or public importance, as contended by appellants and they affect only the parties hereto. We cannot, therefore, consistently join appellants in asking this court "for future guidance in interpreting and administering the existing laws and acts that the Legislature of Alaska may hereafter enact." (pp. 29, 30, 76 and 77, Appellants' brief.)

Appellants, in their contention that said legislative act is void, set forth many objections thereto and extend some of the objections to an imaginary absurdity, as to what may or may not be lienable under this general title. The only question involved in this case is as to whether the title of the act is sufficient to include a lien on the machinery and stamp mill and appliances, used upon the mine in connection therewith. We submit that such machinery and stamp mill were properly treated as a part of the real estate and belonging to the mine, and the appliances and tools connected therewith, are, under all of the authorities, to be treated as a part thereof, and that said machinery and stamp mill, used in connection with said mine, could legally be included in the general title pro-

viding for a laborers' lien upon mines, and that mines and machinery used in connection therewith and being a part thereof, does not include more than one general subject.

Marston vs. Humes, Judge, et al, supra.

People vs. Briggs, 50 N. Y. 553;

People vs. Hills, 35 N. Y. 449;

Tingue vs. Village of Port Chester, 101 N. Y. 294;

People vs. Banks, 67 N. Y. 568;

State vs. Bowers, 14 Ind. 195;

Wheeler vs. State, 23 Ga. 9;

State vs. Garrett, 29 La. Ann. 637;

Railroad Co.'s Appeal, 77 Pa. St. 429;

State vs. Gut, 13 Minn. 341;

Tuttle vs. Strout, 7 Minn. 465.

The objections to this act, by appellants, that the act is not complete in itself, but that the same is ambiguous and uncertain, are untenable under the general principles of statutory construction.

Northern Commercial Co. vs. United States, supra;

United States vs. Union Pacific Railroad Co., 91 U. S. 72, 79, 23 L. Ed. 224;

Platt vs. Union Pacific Railroad Co., 99 U. S. 48, 64, 25 L. Ed. 424;

Smith vs. Townsend, 148 U. S. 490, 494, 13 Sup. Ct. 634, 37 L. Ed. 533;

We submit that the enactment of a laborers' lien law, or the amendment thereof, such as in the case at bar, has never been held to be retroactive or in violation of any provision of the Constitution or any amendment there-

of; but that such laws have been universally sustained, when properly enacted, to the extent of securing a lien against property upon which labor is expended after the passage of such act, and that a provision that such lien will attach to the mine, even under lease, unless the owner thereof performs certain acts by way of giving notice, does not impair any existing rights or take away his property without due process of law. It only imposes the additional duty that the owner must pay such labor to the extent of his property, unless he protects himself therefrom by, as in this case, filing of record his lease and posting notices disclaiming liability, as required in said act, in three conspicuous places upon the property, setting forth, among other things, the name of the lessees and the book and page wherein such lease is recorded. This can be no violation of the inherent or constitutional rights of a lessor. It is a reasonable protection for the laborer, who belongs to a particular class universally recognized as requiring such protection. The importance of such protection could not be better illustrated than in the case at bar. Here defendant Spalding, according to the testimony, and during the times involved, operated said mine, and during such times defendant Brumbaugh was president and prior thereto had been vice-president (Tr. 234 and 256) of the defendant Reliance Mining Co., the owner of said claim. Said defendant Brumbaugh president of defendant company, as aforesaid, was acting as superintendent and bookkeeper at said mine (Tr. p. 234 and 256.) That during said times herein involved, said min-

ing operations were conducted under an extension of the lease, by resolution of the board of directors of defendant company, which lease was not recorded as required by said act, and the laborers could not have known its contents without an inquiry not expected of them or required by law; that if such inquiry had been made, the fact may have been disclosed that the lease under which said mine was being operated, conclusively declares that the consideration for *opening* and *developing* said mine is the right of the lessees to retain all the gold taken therefrom during the life of said lease (or any extension thereof). Tr. p. 253.)

Therefore, we submit, that the parties to this suit were by said lease conclusively bound by their recitals therein, and that the court must consider said mine as unopened and undeveloped, and that the labor expended thereon, for which liens are claimed, was development work. That the presence of defendant Brumbaugh, president of defendant company, as aforesaid, acting in the capacity of superintendent and bookkeeper in such development of such mine, was certainly enough to mislead common laborers or any ordinary business man.

Further evidence of defendant Brumbaugh's dual capacity in the premises is disclosed by his verification as president of said Reliance Mining Co. of defendant company's separate answer herein. (Tr. pp. 228, 229, 234, 235). The application of said legislative act is particularly pertinent under these facts in declaring that "The failure of any owner or owners of such property to post

the notices above provided for, shall be deemed *conclusive proof* of the consent of such owner or owners, that his or their interest in such mine shall be subject to any lien filed under the provisions of this act."

The trial court adopted this view and found further, as a matter of fact, that some time after January 25, 1913, which was before any labor was performed for which a lien was allowed (to-wit, July 30, 1913), that the signature to the notices posted, had been destroyed, as well as the word *quartz*, which had been originally written above the printed word placer mining claim, leaving the notices unsigned and applicable only to "said *placer* mining claim". (Tr. pp. 282, 283.) While there is no express provision of the statute requiring these notices to be, at all times, maintained as originally posted, yet we contend that under the circumstances herein, these notices, during the time of the labor in question, were misleading to the laborers, (if they were anything), and that the defendant company was bound by such misleading notices, or was bound by their insufficiency by the continual daily presence of its then president and former vice-president, the said Brumbaugh, (Tr. pp. 234 and 256.) and superintendent of said mining development. If such notices were posted in three conspicuous places upon the property, as claimed by appellants, then said defendant company is chargeable for the full knowledge of such weatherbeaten cnanges, and chargeable with full knowledge of their contents or insufficiency as well as any laborers upon said property. (Tr. 234 and 235).

We submit, therefore, that such notices were insuffi-

cient to relieve the owner of said mine from liability, even under the lien law existing prior to said act of the territorial legislature; and, if that be true, the liens claimed herein, are valid under the old law.

It is not contended by appellants that any of said notices complied with the requirements of the legislative act. They fail to state "the name or names of the lessee or lessees, or other person or persons other than the owner operating said property", etc.; and it is conceded that neither the lease under which said mining property was being developed, or the extension thereof, was placed of record as required by Sec. 3 of said legislative act.

We submit that the legislative act in question deals with only one *subject*, to-wit, the subject of liens of laborers and material men upon mines and such other properties as are reasonably connected therewith or belonging thereto, as disclosed by the context of the act, and that, even if the act itself does deal with property not properly included in the title, the act would only be void as to such property not belonging or connected with the mines. Any other construction would mean the failure of the principal object and legislative intent of the Alaska legislature. If the objections made by appellants, as disclosed on pages 30 and 31 of their brief, are well taken, it would mean almost an endless amount of legislation by the passage of a separate lien law act for each particular class, kind, or description of property upon which a laborer could have a lien; and by the passage of a separate lien law act for each particular class, kind, or description of property

upon which a material man could have a lien; and that according to appellants' contention herein, each of said innumerable and separate acts should contain statutory provisions for the enforcement and foreclosure of each of said liens.

We submit that the logical and proper interpretation of this act under the law is, that it relates to one *subject* (general subject), which is reasonably expressed in its title.

The fact that the legislative act in question does not provide for the filing of the lien, or the time within which the same should be filed, is no bar in this case, for the reason that said lien was filed within thirty days, as provided by the old lien law, and there has never been any contention that thirty days is an unreasonable time within which to file the same. The act contemplates the filing of a lien, because it refers to such lien.

The objection that the act does not provide the manner of enforcing or foreclosing the lien, is not well taken, first, because the old act provides therefor; secondly, the trial court had original, general and equity jurisdiction with full and inherent power to enforce and foreclose such liens; thirdly, the statute of Alaska provides an adequate method for the foreclosure of liens, Chap. 42 Sec. 1221, etc., Comp. Laws of Alaska. If the court disagrees with appellee's contention and holds that the act is insufficient to cover the stamp mill and machinery, or that the same is personal property, and not belonging to the mine; the act, nevertheless, should be upheld, we submit, to the extent of maintaining our liens against the mine and that

the judgment could be modified accordingly.

We suggest further that the question as to whether a lien under said legislative act should be held to be prior to a mortgage lien of prior date, for the want of posting notices does not come within the scope of this controversy; and that there is no question herein involving the priority of liens. It is further suggested that it is immaterial for the purpose of determining this case, whether under the act a valid lien can be created or enforced against the gold extracted from the mine, "if such gold, in good faith, in due course of business, is sold, for full value to a banker or merchant or used as a medium of exchange, or delivered to the post office or express office for transportation", as appellants *frivously* suggest. pp 36, and 37 of their brief. Appellee apoligizes for taking notice of such absurdities.

The objection of appeliants that the said act of the legislature imposes additional duties on the lessor and thereby divests it of rights already vested, is not well taken. If the argument and law cited on pages 50 to 58, both inclusive, of appellants' brief, are applicable to the case at bar, then we submit that, to enact any labor lien law by any legislature, would be to impair the obligation of contract and take property without due process of law, and would be void as to all persons having acquired property, by deed or otherwise, prior to the passage of such act.

Answering pp. 67, 68 and 69 of appellants' brief, we admit that the three notices posted were "durable, be-

ing printed on cloth, and not susceptible of being quickly faded or obliterated by the action of the elements, and that they remained permanently posted." But we again call attention to the evidence and finding of the court that the word *placer mine* was originally marked but with pen and ink and the word *quartz* written with pen and ink above the word placer, and that the name of the owner of the property was also written on said cloth notices in ink, and that all of said writing was soon obliterated by the weather; thus leaving permanently printed upon said cloth notices the information, that the undersigned, (nobody, because the signature had been eliminated), would not be responsible for any debts incurred by laymen now operating upon said *placer claim*.

We believe the court, by reason of former litigation, and from general information, will not only take judicial notice, but has actual notice that the Tanana Valley, from a mining standpoint, is almost entirely placer, and particularly Dome Creek and the vicinity of the mine in question. We deem it unnecessary to quote Cook et al vs. Klonos, et al, and other important cases heretofore considered by this court. The assertion made by appellants on page 68 of said brief, that "the plaintiff and his assignors, knew the name of the lessee, for they alleged it in their liens and complaint, hence what further information did they desire?" is not in accordance with the facts. In all of the numerous liens filed herein, as well as in the complaint, plaintiff, and his assignors of said liens, alleged that the defendants Spalding and Brumbaugh were operating said mine as lessees).

It is, therefore, probable that the laborers relied for their wages upon holding the property, by reason of the non-compliance with the legislative act upon the part of defendant company, or, upon their belief that the mine was being worked by defendant company, by its president, defendant Brumbaugh, who was superintendent of said mine, or that they relied upon holding defendant Brumbaugh, as one of the lessees, who is presumed to be solvent.

We desire to further call the court's attention to the fact that the plaintiff below and his assignors, alleged in their several claims of lien, that said mine was being operated by defendnts Spalding and Brumbaugh under a ten years' lease, dated June 9, 1913, and recorded in Vol. 5 of Leases, page 498 of the records of Fairbanks Precinct, and claimed liens upon two stamp mills, one of which was located upon the mine, near the working shaft, and the other stamp mill was situate about one-fourth mile from said mine. (Tr. "Exhibit A" to "Exhibit N1", pp. 103 to 194, both inclusive.) It is, therefore, clear, that the laborers were again misled particularly by the conduct of defendants, by relying upon said lease as affecting their rights, because at the trial defendants proved that said recorded lease was made subject to all prior existing leases, and that said operations were not conducted under the same, (which covered the entire mine). (Tr. pp. 238 to 245, both inclusive). But that a small portion of said mine was being developed under an extension of a certain lease dated May 13, 1912, which was not recorded, and which provided for no royalty, and the objects of which, and the consideration therefor, was for the sole

purpose of opening and developing said property. (Tr. pp. 251 to 256, both inclusive.) Under said proof, the laborers were certainly misled by reason of the failure to record the true lease under which said work was being conducted, as required by said legislative act. The effect of such secret so well kept by defendants below, was to enable them to argue to the court that claimants could not have any lien upon said mine, except that portion covered by their *secret* lease, to-wit, 300 feet long by 100 feet deep. In other words, that if they were entitled to a lien, it is only a lien upon the hole or vacancy caused by defendants' working. The court below did not agree with such contention of defendants below and allowed the liens upon the entire mine, according to the provisions of said legislature.

We call the court's attention to the further fact that the court allowed a lien only upon the stamp mill and machinery upon said mine and as belonging thereto, and refused a lien upon the stamp mill not situated upon the mine; this upon the theory that the stamp mill and machinery was a part of the real estate and belonged to the mine. (Tr. pp. 300 to 303, both inclusive).

The only expression of the Supreme Court, which has come within our notice, concerning the validity of the legislative acts of the Alaska legislature, is in the case of the United States vs. John W. Wigger, Vol. 35, No. 3 Sup. St. Rep. p. 42 (Jan. 1, 1915), which case upholds the act considered therein.

Appellants complain of the impossibility contained in the court's Finding No. XII, that John Curry performed

thirty-eight days labor between September 30th and October 8th, 1913. This, of course, is a typographical error and should have read, September 1st instead of September 30th, which is disclosed in Curry's lien (Tr. p. 111). Had Counsel called the court's attention to said typographical error the court would, undoubtedly, have corrected the same. It is a harmless error and too late to raise such objection for the first time in the appellate court.

Taylor vs. Williams, 2 Colo. App. Rep. 559, 31 Pac. 504, 506.

There are a number of objections made in appellants' brief which counsel deems unnecessary to answer, for the reason that it is self-evident that such objections are not well taken.

We respectfully submit that the decree, from which this appeal has been taken, should be sustained and the case affirmed.

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